

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. **78-750**

COMMONWEALTH OF KENTUCKY - - Petitioner

versus

RALPH BRANNON - - - - Respondent

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY**

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SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. _____

COMMONWEALTH OF KENTUCKY - - *Petitioner*

v.

RALPH BRANNON - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The petitioner, the Commonwealth of Kentucky, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kentucky reversing the conviction of the respondent in the Madison Circuit Court at Richmond, Madison County, Kentucky.

OPINION BELOW

The Trial Court rendered no written opinion in this case. A Memorandum Opinion Per Curiam in the instant case was rendered by the Kentucky Supreme Court on September 19, 1978. It is printed in the Appendix to the petition beginning at page 17. The Mandate of the Supreme Court of Kentucky in this case appears at page 19.

JURISDICTION

The Judgment of the Kentucky Supreme Court was entered on September 19, 1978. The jurisdiction of this Court is invoked pursuant to 28 USC § 1257(3).

QUESTION PRESENTED

Whether the Kentucky Supreme Court Misinterpreted and Misapplied to This Case the Prior Decision of This Court in *Taylor v. Kentucky*, 436 U. S. ____, 98 S. Ct. 1930, ____ L. Ed. 2d ____ (1978)?

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND OF THE LAW

Esdell Dargavell and her husband are co-owners of the Mary Dobo Fabric Shop located at 265 Main Street in Richmond, Kentucky (Transcript of Evidence, hereinafter TE, 280). Mrs. Dargavell, age 38 and the mother of four children, was working at the fabric

shop by herself on Monday, June 20, 1977. The retail store is of modest size, some 60 feet long by 40 feet wide with a small bathroom located in the rear of the store (TE, 282).

At approximately 2:30 p.m. Ralph Brannon, age 17, entered the store and began looking at some of the materials that were displayed on the shelves (TE, 283). He was wearing blue jeans, a patterned (or designed) shirt, and his hair looked as though it had been on rollers with the rollers taken out (TE, 285). There were at least three other customers in the store at the time so, after staying a short while, Brannon prepared to leave (TE, 283). However, as he was doing so, he ran into James Hocker, who had known Brannon as a small boy (TE, 310-311). Hocker had come to the store to pay on an account that his wife had there. He talked briefly with Brannon, noticing his hair, and thereafter observed him leave on a bicycle (TE, 311).

Ralph Brannon returned to the fabric shop just before 4:00 p.m. that afternoon and found Mrs. Dargavell alone (TE, 285). Brannon walked to the rear of the store and when Mrs. Dargavell proffered her assistance, he told her he was looking at fabrics for a suit (TE, 286). Suddenly, Brannon reached out to Mrs. Dargavell and began choking her (TE, 286). Although she attempted to resist his attack, she was physically overcome and passed out. When she momentarily came to she found herself on the floor with Brannon kneeling over her, one hand on her throat—the other at his zipper (TE, 286). She heard him say “I have got to have me some of this.” Mrs. Dargavell

remembered saying something to the effect that she wasn't going to do that; whereupon, Brannon began hitting her and she again lost consciousness (TE, 286).

At 4:20 p.m. that afternoon Detective Michael Sexton of the Richmond Police Department responded to a trouble call at the fabric shop (TE, 313). When he arrived at the shop there was already an officer at the scene. Mrs. Dargavell was incoherent, obviously in a state of shock, and kept mumbling "A black man did it, a black man did it." She did not appear to know where she was or what was going on around her (TE, 370). She had been bleeding profusely and her head, face and clothing were literally covered with blood (TE, 313-315). She had a cut on her nose and her head was swollen from the beating she had sustained. In fact, her eyes were nearly swollen shut (TE, 315). Blood was found splattered about the floor and walls and on the racks of fabrics at the rear of the store. A footprint of a tennis shoe was found in the blood on the store floor (TE, 322-325).

Mrs. Dargavell was taken first to the Pattie E. Clay Hospital, then to the Good Samaritan Hospital in Lexington, and finally to the University of Kentucky Medical Center where she was treated and a medical examination for rape performed upon her by a Dr. Suruda at approximately 10:00 p.m. that evening (TE, 345). Dr. Suruda found that she had been beaten severely around the head and eyes which, as previously noted, were swollen and purple in appearance. Her cheeks were bruised and swollen and bruises also appeared on her nose, mouth and neck (TE, 346; Also

see Commonwealth's Exhibits C1-A, C1-B, C1-C). She had also suffered a mild concussion (TE, 347). During the rape examination, Dr. Suruda discovered a small area of sticky material half way into her vagina which appeared to be semen (TE, 349). Closer examination established that three motile (live) sperm were found in this sticky material (TE, 352). It was Dr. Suruda's opinion that she had had sex no more than 6 to 8 hours earlier (TE, 353). A Negroid hair had been found on Mrs. Dargavell's panties that she had been wearing that day and semen stains were also found in the crotch of the panties (TE, 403).

Brannon was arrested at approximately 2:00 a.m. the following morning apparently in a friend's apartment (TE, 330). The police then went downstairs in the same building where Brannon's mother rented an apartment. Upon request by Det. Sexton Brannon's mother gave the police permission to search the apartment (TE, 331). During the search the police discovered a disassembled ten speed bicycle in a rear bedroom and a pair of white tennis shoes which were wet, having soap on the bottom and what appeared to be blood stains on them (TE, 331).

A subsequent search of the apartment, with benefit of a search warrant, produced a pair of faded blue jeans with ragged bottoms and what appeared to be blood stains on them which fit the description of the jeans worn by Brannon at the time of the offense. While Brannon was in custody he presented an alibi stating he had not been to the fabric shop that day,

had not committed the offenses, and in fact had been making love to a girl friend at her home (TE, 391).

On June 6, 1977 the Madison County Grand Jury returned an indictment against Ralph Brannon charging him with the offenses of first degree robbery and aggravated rape in the first degree, as proscribed by KRS 515.020 and KRS 510.040 (Transcript of Record, hereinafter TR, 11). Brannon plead not guilty to the aforementioned offenses and a jury trial was held in the Madison Circuit Court, Honorable James S. Chennault, presiding judge, on October 25 and 26, 1977. Brannon did not take the stand in his own defense. The jury returned a verdict finding Brannon guilty as charged and fixed his punishment at ten (10) years for the robbery charge and thirty (30) years for the rape charge (TE, 488; TR, 76-77). Judgment was entered accordingly on November 7, 1977 wherein his sentences were ordered to be served consecutively (TR, 88-89).

REASONS FOR GRANTING THE WRIT

The Supreme Court of Kentucky has misinterpreted and incorrectly applied a prior decision of this Court, *Taylor v. Kentucky*, 436 U. S. —, 98 S. Ct. 1930, — L. Ed. 2d — (rendered May 30, 1978), to the case at bar. In *Whorton v. Commonwealth*, Ky., — S. W. 2d — (renderd July 25, 1978),* the

*The decision of the Supreme Court of Kentucky in *Whorton v. Commonwealth*, *supra*, appears in its entirety in the Appendix of the petitioner's Petition for Writ of Certiorari previously filed

(Footnote continued on following page)

Supreme Court of Kentucky interpreted *Taylor v. Kentucky* "to mean that when an instruction on the presumption of innocence is asked for and denied there is reversible error."¹ The foregoing interpretation of *Taylor v. Kentucky* requires *automatic reversal* in every criminal case where a request for such an instruction is denied regardless of the circumstances of the case or the possible application of harmless error principles. The petitioner respectfully submits that such an interpretation of *Taylor v. Kentucky* is incorrect.

In *Taylor v. Kentucky*, 436 U. S. —, 98 S. Ct. 1930, — L. Ed. 2d — (rendered May 30, 1978), this Court held that *under the facts* of that case a Kentucky conviction had to be reversed when a request for a presumption of innocence instruction had been refused by the trial court. One June 7, 1978, a week after the *Taylor* decision had been rendered by this Court, *Whorton v. Commonwealth* came before the Supreme Court of Kentucky for oral argument.² One

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and now pending before this Court in *Commonwealth of Kentucky v. Harold Whorton*, October Term, 1978, No. —. The issue presented in the *Whorton* petition is the same as that presented in the instant petition and for that reason petitioner has filed before this Court a motion to consolidate these two petitions for joint consideration and disposition.

¹See Petitioner's Appendix in *Commonwealth of Kentucky v. Whorton*, at page 13.

²After the decision in *Taylor v. Kentucky* by this Court, but before the issuance of the opinion in *Whorton v. Commonwealth* by the Kentucky Supreme Court on July 25, 1978, the Kentucky Court of Appeals—an intermediate state appellate court—*affirmed* convictions in two cases involving requested instructions on pre-

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of the issues of that case was whether the trial court erred in refusing to grant a requested instruction on presumption of innocence. The Supreme Court of Kentucky subsequently rendered its Opinion on July 25, 1978, in *Whorton v. Commonwealth*³ and, with respect to the presumption of innocence instruction issue, stated as follows:

"In *Taylor* a judgment of the Franklin Circuit Court was reversed because the trial court declined to instruct the jury that the law presumes a defendant innocent—and this despite the fact that on *voir dire* the jurors had already signified that they understood that proposition! If the trial court's 'truncated discussion of reasonable doubt . . . was hardly a model of clarity,' as remarked in *Taylor*, we must confess that we have a similar difficulty with the *Taylor* opinion itself.

The dissenting members of our court feel that the holding in *Taylor* is confined to the facts of the case. They draw that inference from the next-to-last sentence of the opinion (emphasis added): 'We hold that *on the facts of this case* the trial

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sumption of innocence wherein that court distinguished *Taylor v. Kentucky* on its facts. *Gully v. Commonwealth*, File No. CA-2048-MR, and *Stewart v. Commonwealth*, File No. CA-1963-MR. These cases were not to be published, and are not cited here as authority, but to apprise this Court chronologically of the impact of *Taylor v. Kentucky* in Kentucky.

³The Supreme Court of Kentucky also reversed on the same day as the Whorton decision the cases of *Williams v. Commonwealth*, File No. 78-SC-68-MR and *Avery v. Commonwealth*, File No. 78-SC-75-MR by Memorandum Opinions. In both cases requests for instructions on presumption of innocence were denied by the trial court. Petitioner intends to file Petitions for Writ of Certiorari in both cases.

court's refusal to give petitioner's requested instruction in the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment.'

Admittedly, the weight of evidence against Whorton was far greater than it was against the defendant in *Taylor*. But does the Supreme Court actually mean to suggest that a defendant's right to the instruction can be made, ultimately, to stand or fall on the weight of the evidence in a given case? If so, then every case in which the trial court refused to give it will have to be decided according to the Chapman-Harrington harmless-error test. If that was the intention, it would have been considerate of the court to say so. It may be that the question of harmless error was not argued in that case, but 'a model of clarity' would have left a clean cut rather than a jagged stump. After all, it might reasonably have been foreseen that this court would have to apply the decision to a goodly number of other cases then in the process of appeal in this state, Whorton's being but one of them.

Those of us in the majority would like to be able to hold that this newly-declared constitutional requirement is subject to the harmless-error rule, but we are afraid it might not stick. We know very well that in actuality *Taylor* was no more 'prejudiced' in his case than Whorton was in this one. Yet *Taylor* contains no hint that it might have been appropriate to consider whether the error was in fact prejudicial. To bring this discussion to a merciful end, we read *Taylor* to mean that when an instruction on the presumption of

innocence is asked for and denied there is a reversible error. If it means something short of that, we shall welcome further enlightenment from the only source that seems to be able either to construe or to amend the Constitution.

The judgment is reversed with directions for a new trial."

The aforementioned language in *Whorton* constituted an unexpected and surprise interpretation of *Taylor v. Kentucky* by the Supreme Court of Kentucky and petitioner thereafter filed a Petition for Rehearing and Modification in *Whorton* urging the court to apply the harmless-error doctrine. However, the petition was subsequently denied on October 10, 1978, and a Petition for Writ of Certiorari is now pending before this Court, styled *Commonwealth of Kentucky v. Harold Whorton*. The instant case, wherein respondent urged eight (8) separate allegations of error on appeal, was reversed by the Supreme Court of Kentucky, citing *Taylor* and *Whorton*, solely upon the trial court's refusal to give the requested instruction on presumption of innocence without regard to the circumstances of this case. This Petition for Writ of Certiorari now results. Compare *Herndon v. Georgia*, 395 U. S. 441 (1935).

It is the position of the petitioner that the Supreme Court of Kentucky has misinterpreted the meaning of *Taylor v. Kentucky* in *Whorton v. Commonwealth* and has misapplied that case to the one at bar. This misinterpretation of *Taylor v. Kentucky* poses a serious hindrance to the effective administration of criminal

justice in Kentucky and will require the *automatic reversal* of numerous state criminal convictions where the accused requested, but was denied, an instruction on presumption of innocence.

The evidence presented by the prosecution in the case at bar is far more substantial than that presented in *Taylor v. Kentucky*. Nor did the prosecutor here act in any manner during trial which would have jeopardized respondent's right to a fair trial as in *Taylor v. Kentucky*. And, unlike *Taylor*, no harmful inferences were made with respect to the indictment. Moreover, there were no suggestions made in this case that respondent's mere status as a defendant would in itself tend to establish guilt—unlike *Taylor v. Kentucky*. Finally, the totality of the evidence in this case, unlike *Taylor*, cannot be described as a mere swearing contest between victim and accused.

Perusal of the decision of this Court in *Taylor v. Kentucky* seems to indicate that that decision turned solely upon its rather unique and unusual facts. The numerous extraneous circumstances which occurred during the trial in the *Taylor* case were specifically noted by this Court and, *when they were considered together*, appeared to establish the basis for the violation of Taylor's constitutional rights. The petitioner maintains that absent any similar such factual circumstances during trial, as in *Taylor*, no such constitutional violation would necessarily occur. This is particularly true in the case at bar where, as just previously noted in detail, the circumstances of this case are not all similar to those in *Taylor v. Kentucky*. There-

fore, this case should have been considered on its own facts and circumstances and not automatically reversed because the trial court refused to give the requested instruction on presumption of innocence.

However, the Supreme Court of Kentucky has interpreted *Taylor v. Kentucky* to mean "that when an instruction on the presumption of innocence is asked for and denied there is a reversible error." Under the decision of the Supreme Court of Kentucky in *Whorton* the respondent's conviction in this case and in every case pending in Kentucky must be *automatically reversed* without regard to the circumstances of the case, the nature of the evidence adduced at trial, or the manner in which the case was prosecuted and defended by counsel or presided over by the trial court. The petitioner submits that this interpretation of *Taylor v. Kentucky* as set out by the Supreme Court of Kentucky in the *Whorton* case is incorrect and that this Court should grant a writ of certiorari to review this matter and to correct the *Whorton* decision. Compare *Republic Steel Corp. v. Maddox*, 379 U. S. 650, 652 (1965). Specifically, the judgment of the lower court should be reversed and vacated with respect to the *Taylor* issue to be reconsidered in light of applicable harmless-error cases of this Court such as *Harrington v. California*, 395 U. S. 250 (1969), and *Chapman v. California*, 386 U. S. 18 (1967).⁴

⁴In its Petition For Rehearing and Modification before the Supreme Court of Kentucky in *Whorton*, the petitioner estimated that between 20 and 80 criminal cases would be automatically reversed due to that court's interpretation of *Taylor v. Kentucky* in *Whorton v. Commonwealth*. Such automatic reversal under *Whor-*

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It is the position of the petitioner that *Taylor v. Kentucky* does not mean that a state criminal conviction in Kentucky must be reversed automatically when a requested instruction on presumption of innocence is refused by the trial court. It is our belief that *Taylor v. Kentucky* does not create a rule of law requiring such an instruction as a *sine qua non* in Kentucky criminal cases.⁵ In fact, it appears to the petitioner that under *Taylor v. Kentucky* any alleged federal constitutional impact of such an instruction, whether requested or not, would depend wholly on the circumstances of each criminal case and it would be only in those cases having exceptional circumstances, such as in *Taylor v. Kentucky*, where the absence of such instruction whether requested or not would result in a

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ton would also apparently apply to *Miller v. Kentucky*, No. 77-6912, wherein this Court recently granted an accused's Petition for Writ of Certiorari on October 2, 1978 and reversed and vacated the judgment of the Supreme Court of Kentucky and ordering that case to be reconsidered in light of *Taylor v. Kentucky*. The Miller conviction had been *affirmed* by the state appellate court *before* this Court retndered its decision in *Taylor*.

⁵The Supreme Court of Kentucky amended Kentucky Rule of Criminal Procedure 9.56, effective July 1, 1978, requiring a presumption of innocence instruction in every criminal case. That Rule reads as follows:

"(1) In every case the jury shall be instructed substantially as follows: 'The law presumes a defendant to be innocent of a crime, and the indictment [or other accusatory document] shall not be considered as evidence or as having any weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty [and if you find him guilty but have a reasonable doubt as to the degree of the offense of which he is guilty, you shall find him guilty of the lower degree].'

"(2) The instructions should not attempt to define the term 'reasonable doubt'."

violation of an accused's right to due process under the Fourteenth Amendment to the United States Constitution. The Supreme Court of Kentucky in its Opinion in *Whorton v. Commonwealth* has clearly misinterpreted the decision of this Court in *Taylor v. Kentucky*. But, even in the decision in *Whorton v. Commonwealth*, the Supreme Court of Kentucky clearly indicated that it was unsure of the meaning and import of this Court's decision in *Taylor v. Kentucky* and would welcome "further enlightenment" from this Honorable Court with respect to what *Taylor v. Kentucky* means.

CONCLUSION

For the foregoing reasons the petitioner respectfully submits that this Court should grant a writ of certiorari in this case in order to rectify the misinterpretation and application by the Supreme Court of Kentucky of *Taylor v. Kentucky* with the case at bar.

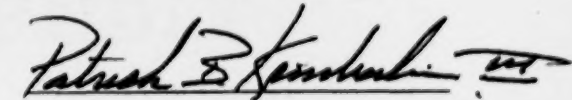
Respectfully submitted,

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PROOF OF SERVICE

I, Patrick B. Kimberlin, III, one of counsel for the petitioner, hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, this 2nd day of November, 1978, to Hon. William M. Radigan, Assistant Public Defender, State Office Building Annex, Frankfort, Kentucky 40601, Counsel for Respondent.



PATRICK B. KIMBERLIN, III
Assistant Attorney General

APPENDIX

SUPREME COURT OF KENTUCKY

RENDERED: SEPTEMBER 19, 1978

78-SC-206-MR

RALPH BRANNON - - - - - *Appellant**v.*COMMONWEALTH OF KENTUCKY - - - *Appellee*

*Appeal From Madison Circuit Court
Honorable James S. Chenault, Judge
No. 77-65*

**MEMORANDUM OPINION PER CURIAM—
REVERSING—Docketed September 19, 1978**

Brannon was indicted for the offense of first-degree robbery and aggravated rape in the first degree. KRS 515.020; KRS 510.040. He pleaded not guilty. At trial, the jury found him guilty of both offenses. The punishment imposed was consecutive sentences of ten years imprisonment for first-degree robbery and thirty years imprisonment for aggravated rape. He appeals.

In *Taylor v. Kentucky*, ___ U. S. ___ 46 U.S.L.W. 4528 (1978) the Supreme Court of the United States established the principle that the due process clause of the Fourteenth Amendment of the federal constitution requires a state trial judge to instruct the jury on the presumption of innocence when requested by a criminal defendant. The supremacy clause of Article VI of the federal constitution

compels us to apply that principal to this case. When we do, reversal and new trial are required because such a request was not granted. *Whorton v. Commonwealth, Ky.*, ___ S. W. 2d ___ (1978).

The judgment is reversed and the cause is remanded to the Madison Circuit Court for a new trial.

All concur except Clayton and Stephenson, JJ., who dissent for reasons expressed in *Whorton, supra*.

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SUPREME COURT OF KENTUCKY

OPINION RENDERED: SEPTEMBER 19, 1978

RALPH BRANNON

v.

COMMONWEALTH OF KENTUCKY

File No. 78-SC-206-MR

*Appeal From Madison Circuit Court
Action No. 77-65*

MANDATE—Issued October 26, 1978

The Court being sufficiently advised, delivered herein an opinion per curiam, and it seems to them the judgment herein is erroneous.

It is therefore considered that the judgment is reversed and the cause is remanded to the Madison Circuit Court for a new trial.

A Copy - Attest:

Issued October 26, 1978

(s) Martha Layne Collins, Clerk